IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-1546

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WILLIAM BANTON MOORE, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

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**On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky**

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## PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for a Writ of Certiorari entered on October 9, 1973[1] and (2) granting the Petition. As grounds for this Motion, petitioner states the following.

### The Granting of Certiorari in Donnelly v. DeChristoforo, No. 72-1570.

On October 23, 1973, following the denial of certiorari in the instant case, this Court granted certiorari in *Donnelly* v. *DeChristoforo,* No. 72-1570,

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[1] Mr. Justice Douglas noted that he would have granted certiorari.

ruling below 473 F.2d 1236 (1st Cir. 1973) (hereinafter *DeChristoforo*). The question presented in *DeChristoforo* calls upon this Court to consider the constitutional limitations which the Due Process Clause of the fourteenth amendment imposes upon a state prosecutor in his summation to the jury.[2] The petition herein, contemporaneously pending with the petition in *DeChristoforo,* raises the identical issue under even more compelling circumstances.

DeChristoforo and a co-defendant were tried in the state court of Massachusetts on a charge of first degree murder. In the middle of the trial, the co-defendant entered a plea of guilty to second degree murder. The jury convicted *DeChristoforo* of first degree murder rejecting his defense that he had been an innocent bystander.

After his conviction was affirmed on appeal, DeChristoforo sought a writ of habeas corpus in federal court asserting that two statements in the prosecutor's summation deprived him of due process of law. The first was the prosecutor's expression of his personal belief in DeChristoforo's guilt. The second was the prosecutor's expression of his opinion that even DeChristoforo expected a conviction which, in light of his co-defendant's plea, suggested to the jury that DeChristoforo had sought to plead to a lesser offense and been refused. Since in fact no such plea offer had been made, the First Circuit reversed the district

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[2] Question presented: Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the fourteenth amendment to the Constitution. Petition for Writ of Certiorari, Donnelly v. DeChristoforo, No. 72-1570 at 2.

court's denial of the writ finding that the second statement conveyed a false impression and violated due process. 473 F.2d at 1240-41.[3]

After a jury trial in state court in Kentucky, petitioner was convicted of voluntary manslaughter arising out of the death of his wife. The jury imposed the maximum sentence of 21 years and the conviction was affirmed by the Court of Appeals of Kentucky. Without repeating the factual development of the petition, a review of the trial record demonstrates that guilt or innocence turned on the question of whether or not the death of petitioner's wife from a fractured skull resulted from an accidental fall or multiple blows to the head from a criminal agency.

The deceased was found in her bathroom in a pool of blood from an avulsing scalp wound. The state's evidence on the cause of death consisted of volatile and inflammatory photographs of the deceased and the testimony of two doctors who were not specialists in forensic pathology that the fatal head injuries were caused by multiple blows. Petitioner called two of the most eminent forensic pathologists in the country who testified to their conclusions separately reached that the death was from an accidental fall.

In his summation, the prosecutor, over objection, committed both of the improprieties noted by the First Circuit in *DeChristoforo*. He expressed his per-

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[3] While condemning the expression of personal opinion as unethical and improper, the First Circuit did not find that, standing alone, the expression by the prosecutor of his personal belief in the guilt of the accused constituted a violation of due process. 473 F.2d at 1238.

sonal belief in petitioner's guilt (612, 21a, 621, 27a)[4] and conveyed false impressions contrary to the evidence, including a reenactment of the crime during which he threw a bathroom stool across the courtroom suggesting without evidentiary support that it was the murder weapon. (619, 26a) In addition, the heart of the summation was an appeal to the passion of the jury marked by a blatant attempt to arouse sectional prejudice. He asserted that the doctors were paid perjurers and political hacks from New York and Pennsylvania who had come down to Kentucky to "pull the wool over the eyes" of a "dumb Kentucky jury" and that petitioner was able to procure such an advantage because of his money and the fact that his brother was a smart New York lawyer. (612-13, 21-22a) The prosecutor's inferences, improper as an appeal to sectional prejudice, were argued despite facts to the contrary in the trial record. (See, 361-64, 365-67, 390-91).

Thus, the close identity of issues between this case and *DeChristoforo* amply justify reconsideration of the denial of certiorari here. Full development of the question presented in *DeChristoforo* would be enhanced if the Court were to consider the instant case at the same time and thereby explore a wider range of abuses in prosecutorial summations.[5] The need for such

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[4] The record references are to the trial transcript. The summation is reproduced in the Appendix to the petition and is also cited by the "a" references.

[5] At the very lease, reconsideration of the denial of certiorari is justified in order to hold this case open pending the decision in DeChristoforo because if that decision upholds the First Circuit's finding that the prosecutor's closing argument violated due process of law, then identical issues preserved by this petition and contemporaneously pending would thereby be affected.

review is underscored by the disturbing increase in prosecutorial trial misconduct which strikes at the heart of the truth-determining process of our adversary jury system.[6] Moreover, each of the abuses petitioner raises—expression of personal opinion, argument misstating the record, and blatant appeals to passion or sectional prejudice—are capable of explicit proscription and will not result in requests for this Court's hindsight judgment on every summation by a federal or state prosecutor. By announcing definite guidelines, prosecutorial self-discipline in summation will be fostered and misconduct thinly disguised as rhetoric will be curbed.

## CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

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[6] For example, in United States v. White, No. 73-1597 (2nd Cir. decided October 11, 1973), an appeal involving an allegation of improper summation, the Second Circuit noted "the frequency with which allegations of prosecutorial misconduct have come before this court," citing six cases in the last six months many of which involved the remarks of prosecutors in summation. Slip Op. at 114 n. 4.

**Certificate of Counsel**

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

WILLIAM E. MCDANIELS